**IN THE UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

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| ALEX VESELY, individually and as special administrator and brother of JITKA VESELY (Deceased), | ) | |
| Plaintiff, | ) | Case No. 1:13-cv-00607-SBC-JC |
| v. | ) | |
| ARMSLIST, LLC, and Oklahoma Limited Liability Company, | ) | |
| Defendant. | ) | |

**MEMORANDUM OF MEMBERS OF CONGRESS WHO VOTED FOR THE COMMUNICATIONS DECENCY ACT AS AMICI CURIAE ON THE MEANING OF THAT ACT IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

Amici, members of Congress who voted for the Communications Decency Act, by their attorneys, Harris Beach PLLC and Gordon & Karr LLP, submit the following memorandum in opposition to the defendant's motion to dismiss.

## I. STATEMENTS OF INTEREST

Amici are Members of Congress who supported and voted for the Communications Decency Act, including Section 230 ("CDA" or "the Act"), when it was enacted. As supporters who were involved firsthand in the birth of this legislation—its drafting, debate, and enactment—they know the intent of Congress in enacting it. Amici are concerned that the CDA has been, and is being, invoked to provide special protection to conduct and actors that were not intended to be protected by the CDA and should not receive special protection under a proper reading of the Act. This appears to be such a case: The CDA was not intended to provide any special protection to website operators who facilitate and enable dangerous persons to obtain

firearms outside of the regulated commerce of licensed firearms dealers, including by illegal gun sales.

Amici include Representatives Luis V. Gutierrez (IL-04), Jim Moran (VA-08), Charles B. Rangel (NY-13), Bobby L. Rush (IL-01), and Louise M. Slaughter (NY-25).

## II. TEXT AND PURPOSE OF SECTION 230 OF THE COMMUNICATIONS DECENCY ACT

Section 230 of the Communications Decency Act must be read in light of its legislative intent, for "nothing is better settled, than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion." *Johnson v. United States*, 529 U.S. 694, 707 (2000) (quoting *In re Chapman*, 166 U.S. 661, 667 (1897)).

Congress enacted Section 230 to achieve two objectives: to address the problem of children accessing pornography and other offensive material on the Internet, and to promote freedom of expression on the Internet. Promoting freedom of expression, Section 230(c)(1) immunizes computer service providers such as websites and Internet Service Providers from any theory of liability that depends upon their being "treated as the publisher or speaker of any information provided by" someone else. As a result, the Comcasts and Verizons of the world can provide unfettered access to the Internet without fear of tort liability should some of the third-party-created content they provide access to prove controversial or even defamatory.

Section 230's effect on children's access to objectionable Internet content is slightly more roundabout. Section 230(c)(2) states that "[n]o provider . . . of an interactive computer service shall be held liable on account of . . . any action taken in good faith to restrict access to . . . [objectionable content]." Rather than creating a positive incentive to censor content, the provision operates by removing a major disincentive to censorship: the threat of tort liability. In

crafting § 230(c)(2), Congress had firmly in mind the then-recent decision *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), in which a New York state trial court held an Internet Service Provider liable for defamatory content posted by a third party on one of the service's message boards. The court reasoned that because Prodigy had taken steps to screen offensive content, it had taken on the role of a newspaper-like publisher rather than a mere distributor and could therefore be held liable for the defamer's words. *Id.* at *4. Congress viewed this decision as, essentially, a case in which "no good deed goes unpunished," and in enacting the CDA, Congress intended to protect such "Good Samaritans"—as the title of this provision makes clear. With § 230(c)(2), Congress rejected such reasoning, freeing websites and Internet Service Providers to censor objectionable or simply off-topic third-party-created content without fear of thereby incurring liability for the content that they do not censor.

## III. THE 7TH CIRCUIT'S SOLUTION TO RECURRING INTERPRETIVE DIFFICULTIES

The first courts to interpret § 230 construed the statute broadly, creating immunity to "any cause of action that would make service providers liable for information originating with a third-party user of the service." *Zeran v. Am. Online, Inc.*, 192 F.3d 327, 330 (4th Cir. 1997); *see also Ben Ezra, Weinstein & Co. v. Am. Online, Inc.*, 206 F.3d 980 (10th Cir. 2000); *Green v. Am. Online*, 318 F.3d 465 (3d Cir. 2003); *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007). The broad interpretations of Section 230 espoused by the early courts serve one of the Section's goals quite well: If Section 230 creates categorical immunity from any cause of action involving third-party-created information, there can be no recurrence of the *Stratton Oakmont* decision wherein an Internet Service Provider was deemed liable for defamatory content created by its users.

But, as a burgeoning body of court decisions and commentary has explained,[1] the broad immunity conferred upon defendants in the *Zeran* line of cases creates an unacceptable tension between § 230 subsections (c)(1) and (c)(2) and operates directly contrary to Congress's intent in enacting the statute. Section 230(c)(1) states that "[n]o provider . . . of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." *Zeran* and other courts interpreted this language to immunize websites from liability for any third-party-created content regardless of the cause of action asserted by the plaintiff and regardless of whether the website assisted the third party in developing the content.

Utterly contrary to the intent of the CDA, this reading provides "Good Samaritan" immunity to actors who make no effort to screen or remove objectionable content—certainly not Good Samaritans, and in in some instances the polar opposite. Further, this reading defies the canon of surplusage, which instructs courts that "[i]n construing a statute we are obliged to give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). If providers who choose to censor third-party-created content are already immune under subsection (c)(1) because the content is not their own, then what is the purpose of subsection (c)(2), which grants immunity if they choose to censor?

Recognizing this interpretive problem, the Seventh Circuit has led a departure from the *Zeran* line, noting that while "[t]hat view has support in other circuits . . . § 230 as a whole cannot be understood as a general prohibition of civil liability for web-site operators and other

[1] *See generally* Gregory M. Dickinson, Note, *An Interpretive Framework for Narrower Immunity Under Section 230 of the Communications Decency Act*, 33 HARV. J.L. & PUB. POL'Y 863 (2010); Joel R. Reidenberg et al., *Section 230 of the Communications Decency Act: A Survey of the Legal Literature and Reform Proposals*, Fordham Law Legal Studies Research Paper No. 2046230, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2046230 (collecting and summarizing criticism of courts' interpretation of Section 230 and consequent undesirable policy outcomes).

online content hosts." *Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669 (7th Cir. 2008). Such a view would read subsection (c)(2) entirely out of the text and render the Section powerless to achieve its stated objective: "§ 230(c)—which is, recall, part of the 'Communications Decency Act'—bears the title 'Protection for "Good Samaritan" blocking and screening of offensive material', hardly an apt description if its principal effect is to induce ISPs to do nothing . . . ." *Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003).

Instead, the Seventh Circuit and other courts have moved to restrict the scope of § 230 immunity in two ways. First, courts have read § 230(c)(1) not categorically to immunize websites from any action related to third-party-created content, but, rather, to prohibit liability only under theories requiring that a website be treated as the "publisher or speaker" of third-party-created information. As Judge Easterbrook articulated the principle in *City of Chicago, Illinois v. StubHub!, Inc.*,[2] "[Section 230] limits who may be called the publisher of information that appears online. That might matter to liability for defamation, obscenity, or copyright infringement. But [Plaintiff's] amusement tax does not depend on who 'publishes' any information or is a 'speaker'. Section 230(c) is irrelevant." 624 F.3d 363, 366 (7th Cir. 2010).

Second, recent decisions have recognized that a website or other defendant is not entitled to immunity under § 230(c)(1) for the consequences of content it has played a role in creating or developing. A website that creates or develops damaging content, either itself, in cooperation with another, or vicariously through another party, cannot later avail itself of § 230(c)(1)'s

[2] *See also Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669 (7th Cir. 2008) ("What § 230(c)(1) says is that an online information system must not 'be treated as the publisher or speaker of any information provided by' someone else."); *Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003) (speculating prior to the Seventh Circuit's eventual adoption of the view that "perhaps § 230(c)(1) forecloses any liability that depends on deeming the ISP a 'publisher'—defamation law would be a good example of such liability—while permitting the states to regulate the ISPs in their capacity as intermediaries.").

immunity provision, which immunizes only in cases of "information provided by another information content provider." 47 U.S.C. § 230(c)(1); *see Fair Housing Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157, 1165 (9th Cir. 2008) (en banc) (explaining that where a website assists third parties in creating or developing the content they post on the site, the website will be treated as a cocreator of the information and be ineligible for § 230 protection);[3] *Lansing v. Sw. Airlines Co.*, 980 N.E.2d 630, 641 (Ill. App. Ct. 2012) (applying Seventh Circuit law, reversing trial court, and finding § 230 not to prevent an employer's vicarious liability for its employee's conduct under a theory of negligent supervision); Dickinson, *Interpretive Framework, supra*, at 879–80, n.79 (collecting cases and explaining that vicarious liability theories such as respondeat superior, ratification, and concert of action survived Congress's passage of the CDA and apply to Internet-based torts).

## IV. THE COMMUNICATIONS DECENCY ACT DOES NOT PREEMPT PLAINTIFF'S CLAIM

### A. Plaintiff's Claim Does Not Treat Armslist as a Speaker or Publisher

The Seventh Circuit has read § 230 to do just what it says: "What § 230(c)(1) says is that an online information system must not be 'treated as the publisher or speaker of any information provided by' someone else." *Chicago Lawyers'*, 519 F.3d at 671. Applying this principle, § 230 has been interpreted to bar actions seeking to hold websites liable as the speakers or publishers of content created by their users, but to permit actions seeking to hold websites liable in other roles.

Thus, for example, *Chicago Lawyers'* found § 230 to bar a claim against a website for housing advertisements posted by its third-party users under a statute making it illegal "to make, print, or publish" advertisements regarding the sale or rental of a dwelling that indicate a preference regarding race and other protected categories; *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d

[3] *See also Hadley v. GateHouse Media Freeport Holdings, Inc.*, No. 12 C 1548, 2012 WL 2866463, at *2 n.2 (N.D. Ill. July 10, 2012) (citing *Roommates.com* and noting that a website can be both an interactive service provider and information content provider for purposes of § 230).

961 (N.D. Ill. 2009), refused to permit an action for disturbing the peace against a website for advertisements posted by its third-party users that violated statutes and ordinances barring soliciting for prostitutes; and *Hadley v. Gatehouse Media Freeport Holdings, Inc.*, No. 12 C 1548, 2012 WL 2866463 (N.D. Ill. July 10, 2012), found barred by § 230 a plaintiff's defamation claim against a newspaper for defamatory comments posted to its website by an anonymous third-party commenter.

Seventh Circuit courts have refused to expand § 230 further, however, to protect defendants against causes of action unrelated to speech or publication. In *City of Chicago, Illinois v. StubHub!*, for example, the Seventh Circuit interpreted § 230 not to protect the website *StubHub!* from a claim by the City of Chicago that as a website connecting buyers and sellers of tickets to sporting events it was responsible to collect a nine percent city amusement tax. Although third parties were responsible for creating the ticket listings, the claim was not barred by § 230 because the plaintiff sought to hold the website liable not as the publisher or speaker of the listings but as a sales agent that failed to collect the required tax.

Similarly, in *Lansing v. Sw. Airlines Co.*, 980 N.E.2d 630, 641 (Ill. App. Ct. 2012), § 230 was found not to bar a plaintiff's claim against Southwest Airlines where the airline had allegedly failed to properly supervise its employee and prevent his use of the company's computer systems to send repeated harassing messages to a passenger of the airline and his family. The court, applying Seventh Circuit precedent, reasoned that § 230 did not bar the claim because the plaintiff sought to hold the company liable not for speaking or publishing the harassing messages but for permitting the harassment through negligent employee supervision.

Plaintiff in this case, Alex Vesely, brings wrongful death, family expense, and survival actions against Defendant Armslist, alleging that the Defendant operated its website in a

commercially unreasonable manner by designing its website so as to encourage its users to circumvent existing gun laws and that this design proximately caused the death of Plaintiff's next of kin, Jitka Vesely. Compl. ¶¶ 47–56. Armslist responds, citing *Zeran*, that § 230 creates broad immunity for any cause of action that would make it liable for information provided by a third party and arguing that Armslist cannot therefore be liable for the consequences of any gun sale listings posted by third parties on its website. Def.'s Mem. in Supp. of Mot. to Dismiss 5–6.

As discussed above, however, § 230 provides immunity only from causes of action that seek to treat a defendant as the publisher or speaker of information created by a third party. Section 230 bars a plaintiff from attributing to a website the speech of its third-party users to assert causes of action that depend on speech or publication—defamation, obscenity, solicitation for prostitution, and copyright infringement are prime examples—but here the Plaintiff seeks to hold the Defendant liable not as a publisher or speaker of its users' information but as a commercial entity that negligently operated its business so as to encourage its users to conduct illegal gun sales. Unsurprisingly, leading Illinois wrongful death cases involving allegations of third-party liability have given no attention whatever to whether a third-party defendant should be treated as the publisher or speaker of another actor's words.[4] The inquiry, whichever way it were resolved, would be irrelevant to the analysis because speech and publication are unnecessary to a wrongful death claim. Where, as here, a cause of action does not seek to hold a

[4] *See, e.g., Bajwa v. Metro. Life Ins. Co.*, 804 N.E.2d 519, 529 (Ill. 2004) (with no mention of speech or publication, applying the traditional factors of reasonable foreseeability, likelihood of injury, magnitude of guarding against injury, and consequences of placing that burden on the defendant when considering whether an insurance company's issuance, under suspicious circumstances, of a life insurance policy insuring the life of the decedent and benefiting his killer could support a negligence-based wrongful death action by the decedent's estate against the insurance company); *Young v. Bryco Arms*, 821 N.E.2d 1078, 1085–91 (Ill. 2004) (without reference to speech or publication, analyzing sufficiency of plaintiff's duty and causation allegations in action by survivors of shooting victims against gun manufacturers).

defendant liable as the speaker or publisher of information, § 230 does not apply. Whether this or that actor may have spoken or even done so over the Internet is irrelevant.

The Seventh Circuit's *StubHub!* decision illustrates the point. Stubhub.com allows users of the website to buy sporting event tickets for sale by other website users or to list their own tickets for sale. Fearful that the website was being used by buyers and sellers to evade municipal taxes but unwilling to pursue claims against thousands of separate individuals, the City of Chicago sought to enforce against StubHub! a municipal code provision requiring that amusement "sales agents" collect a city amusement tax on ticket sales above face value. StubHub! responded by asserting immunity under § 230: In StubHub!'s view, by considering it a sales agent for purposes of the tax provision when in fact its third-party users were the ones buying and selling tickets, or, alternatively, as responsible because its website assisted such sales, the city was treating it as a publisher or speaker of third-party-created information.[5] Finding § 230 not to bar the claim, the court explained that unlike a defamation, obscenity, or copyright action, the city's municipal code provision did not depend on who was the publisher or speaker of any information, making § 230 irrelevant. *StubHub!*, 624 F.3d at 366.

Whether § 230 bars a particular claim, therefore, does not depend on whether a case involves third-party speech on the Internet. (Indeed, the worrisome volume of tax-avoiding third-party speech is precisely what attracted the city's attention in *StubHub!*.) Rather, the applicability of § 230 depends on whether the particular action asserted requires treating the defendant as the speaker of some of the third-party-created content at issue. Because the Plaintiff here asserts wrongful death and related claims that, like those in *StubHub!* and *Lansing*, involve speech by third parties but do not attribute that speech to the Defendant, § 230 does not apply.

[5] *See* Brief of Defendant-Appellee Stubhub!, Inc., *City of Chicago, Illinois v. StubHub!, Inc.*, 624 F.3d 363 (7th Cir. 2010) (No. 09-3432), 2010 WL 3950593, at *43–44.

### B. Armslist is Partly Responsible for the Content on its Website[6]

Section 230(c)(1) states that a website or other provider of interactive computer services shall not be treated as the publisher or speaker of "information provided by another information content provider." This grant of immunity applies only if the website is not itself an "information content provider" of the information at issue—defined as someone who is "responsible, in whole or in part, for the creation or development of the offending content." 47 U.S.C. § 230(f)(3). Immunity under the Section is unavailable to defendant websites that are themselves responsible for creating or developing the content at issue.

Benedict Ladera is clearly an information content provider in this case. As the individual who listed for sale the gun that killed Jitka Vesely, he is undoubtedly responsible for the creation of the listing. "Ladera is clearly not Armslist," as Defendant asserts, Def.'s Mem. in Supp. of Mot. to Dismiss 7, but from that premise does not follow the conclusion that Ladera alone and not also Armslist is responsible for creating or developing the listing. Courts interpreting § 230 recognize that more than one individual is often responsible for content that is made available on the Internet: "[T]he fact that users are information content providers does not preclude [defendant website] from *also* being an information content provider by helping 'develop' at least 'in part' the information . . . ." *Roommates.com*, 521 F.3d at 1165.[7]

In *Fair Housing Council of San Fernando Valley v. Roommates.com*, the leading case on this issue, the Ninth Circuit, sitting en banc, considered a housing discrimination claim against

[6] Applying CDA § 230 requires two distinct inquiries: First, as discussed above, a court must determine whether a cause of action *treats* a defendant as a publisher or speaker to determine whether the cause of action falls within the scope of the CDA. Second, as outlined below, a court must determine whether a defendant *is in fact* responsible for content that is published or spoken to determine whether the defendant is eligible for immunity. That a defendant may in fact be partly responsible for developing content does not imply that every cause of action against that defendant treats the defendant as a publisher or speaker.

[7] *See also Stayart v. Yahoo! Inc.*, 651 F. Supp. 2d 873, 886 (E.D. Wis. 2009) (citing *Roommates.com* for this proposition).

the website Roommates.com. The website allowed its users to list spare rooms for rent or to search the site for rental opportunities. The Fair Housing Councils of San Fernando Valley and San Diego sued Roommates.com, alleging that many of the listings included discriminatory housing preferences in violation of the Fair Housing Act, which makes it unlawful "[t]o make, print, or publish . . . any statement . . . with respect to the sale or rental of a dwelling that indicates any [discriminatory preference]." 42 U.S.C. § 3604(c).

In rejecting Roommates.com's § 230 defense, the court explained that although the housing listings were posted by its third-party users, the website could *also* be responsible for them as a second "information content creator," making it ineligible for immunity under § 230(c)(1), if its design of the website contributed to the listings. Noting that to post or search housing listings on the website, users were asked to provide information such as their sexual orientation, sex, and whether they desired or would bring children to the household, the court reasoned that

> [b]y requiring subscribers to provide the information as a condition of accessing the service, and by providing a limited set of pre-populated answers, Roommate becomes much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of that information. . . . [T]o claim that the information in such circumstances is "created solely by" the customer, and that the business has not helped in the least to develop it strains both credulity and English.

*Roommates.com*, 521 F.3d at 1166.

As did the Roommates.com website, Armslist's website directs its users, both buyers and sellers, through a set questions with prepopulated answer possibilities that prompt them to provide information including which state the purchase or sale will occur in, the type of gun being bought or sold, and whether the sale will be conducted privately or through a licensed gun dealer. After a seller selects among the provided answer options for each question posed by the

website and creates the sale listing, the listing is made automatically available to buyers nationwide. Potential buyers can identify listings that interest them through the reverse process: Through a series of Armslist-provided prepopulated drop-down menus and checkbox options, the website directs buyers to listings that match their desired preferences for location, manufacturer, caliber, action type, firearm type, and licensed dealer versus private seller.

Given the collaborative content-creation process through which Armslist's website guides its users to create gun sale listings by presenting them with a series of questions and prepopulated answer choices, Armslist cannot now argue that its users alone are *solely* responsible for developing the content at issue. Armslist, too, played a part and in so doing stepped beyond the role of mere content intermediary, shielded by Congress under § 230(c)(1), and into the role of a content codeveloper, which Congress excluded from protection as "responsible . . . in part, for the creation or development of the offending content." § 230(f)(3).

## V. CONCLUSION

Amici urge this Court to apply § 230 according to the intent of Congress in enacting it, neither broadening its scope to encompass causes of action unrelated to speech or publication nor construing it so as to protect parties themselves partly responsible for the development of the content in question.

Respectfully submitted,

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